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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/591,897	06/12/2000	Lawrence William Host	FUSION.0002P	3745
27111	7590	04/29/2004	EXAMINER	
BROWN, MARTIN, HALLER & MCCLAIN LLP			JUNG, MIN	
1660 UNION STREET			ART UNIT	
SAN DIEGO, CA 92101-2926			PAPER NUMBER	
			2663	70

DATE MAILED: 04/29/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/591,897

Applicant(s)

HOST, LAWRENCE WILLIAM

Examiner

Min Jung

Art Unit

2663

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 27 February 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 24-31 and 47-51 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 24-31 and 47-51 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Claim Rejections - 35 USC § 112***

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 24-31 and 47-51 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claims 24 and 29, line 5, “;” should be inserted after ----location-----.

In claim 27, line 1, “send” should be changed to ----sending-----.

In claim 29, line 9, it is not clear whether the “data packets” are referring to the same data packets recited at lines 6-8, or subsequent data packets to be transmitted after the evaluation took place. In other words, are the same packets retransmitted using different route, or only the subsequent packets are transmitted using different route?

In claim 47, line 9, “said test packets” lacks antecedent basis.

In claim 50, one of “wherein said” should be deleted.

***Claim Rejections - 35 USC § 102***

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) and the Intellectual Property and High Technology Technical Amendments Act of 2002 do not apply when the reference is a U.S. patent resulting directly or indirectly from an international application filed before November 29, 2000. Therefore, the prior art date of the reference is determined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

4. Claims 24-31 and 47-51 are rejected under 35 U.S.C. 102(e) as being anticipated by Lamarque, III et al., US 6,690,651 (Lamarque).

Lamarque discloses a method and apparatus for changing routing when the quality of service falls below an acceptable level. Regarding claims 24-31 and 47-51, Lamarque teaches that when the quality of the path one end user uses to connect to another end user falls below a quality of service that is acceptable, then the call is rerouted so that the call takes a different path which provides a higher quality of service on the packet based network. See col. 1, line 60 – col. 2, line 7, col. 3, lines 52-60, col. 4, lines 17-20, and col. 8, lines 12-22. The call taking a different path inherently covers the action of transmitting packets to a third location before transmitting them to the destination. In Lamarque, the test packet of the present invention may read on the packets transmitted prior to the path changing action is taken, or the test packets implied by the teaching of monitoring application and “pinging” described at col. 7, lines 56-62. The present invention also calls for each location comprising interfaces. Having

interfaces in the user location in Lamarque is an inherent feature at least to accommodate voice over the digital network. Further, specifically shown is the interface within each gateway (Fig. 3). Further, Lamarque teaches determining the quality of service from the latency measurement (col. 7, lines 56-62). Further, specifically regarding the limitation of claim 28, Lamarque's teaching is targeted at the satisfactory communication quality for voice over IP. See col. 1, lines 44-54.

Further, specifically regarding claims 47-51, the path characteristic packets and test packets may read on either the packets transmitted prior to the path changing action is taken, or the test packets implied by the teaching of monitoring application and "pinging" described at col. 7, lines 56-62.

### ***Response to Arguments***

5. Applicant's arguments with respect to claims 24-31 and 47-51 have been considered but are moot in view of the new ground(s) of rejection.


6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Min Jung whose telephone number is 703-305-4363.

The examiner can normally be reached on Monday-Friday, 7AM-3PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Chau Nguyen can be reached on 703-308-5340. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

MJ  
April 27, 2004

  
Min Jung  
Primary Examiner